90-1501

No.

Supreme Court, U.S.
FILED
MAR 27 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

OLIVER L. NORTH,
Cross-Petitioner,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

CROSS-PETITION FOR A WRIT OF CERTIORARI

BRENDAN V. SULLIVAN, JR.
Counsel of Record
BARRY S. SIMON
PAUL MOGIN
NICOLE K. SELIGMAN
JOHN D. CLINE
WILLIAMS & CONNOLLY
839-17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Cross-Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether an instruction directing a verdict on an essential element of an offense can be harmless error?

2. Whether it was error (a) to instruct the jury that the word "corruptly" in 18 U.S.C. § 1505 means only the intent to obstruct an inquiry or proceeding, and (b) to preclude the jury from considering evidence that the defendant believed his conduct was lawfully authorized by his superiors unless it found that he reasonably believed that the authorization was legally proper?

3. Whether the court of appeals erred (a) in applying the harmless error standard for nonconstitutional error to an order compelling the defendant to disclose before trial a 162-page summary of anticipated classified defense testimony without requiring reciprocal disclosure by the government, (b) in considering only the harm to the defendant from the government's undisclosed rebuttal evidence, while ignoring the harm to the defendant from the disclosure of anticipated defense testimony, and (c) in placing the burden of proving harm from the nonreciprocal disclosure on the defendant?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Proceedings Below	2
B. The Charges Remaining Against North	5
1. Count 6	5
2. Count 10	7
REASONS FOR GRANTING THE WRIT	7
I. THE MAJORITY'S HOLDING THAT THE DISTRICT COURT'S PARTIAL DIRECTED VERDICT ON COUNT 6 WAS HARMLESS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS	7
II. THE MAJORITY'S HOLDING ON INTENT AND AUTHORIZATION UNDER 18 U.S.C. § 1505 CONFLICTS WITH THIS COURT'S DECISIONS IN *CHEEK* v. *UNITED STATES* AND *LIPAROTA* v. *UNITED STATES*	14
A. Under *Cheek* and *Liparota*, Serious Federal Offenses That Penalize a Range of Apparently Innocent Conduct Require Subjective Knowledge of Wrongfulness or Illegality	15
B. The Panel Majority's Holding on Intent and Authorization Under 18 U.S.C. § 1505 Conflicts with the Requirement of Fair Notice Recognized in *Cheek* and *Liparota*	18

TABLE OF CONTENTS—Continued

Page

III. THE MAJORITY'S HOLDING THAT THE DISTRICT COURT'S REFUSAL TO REQUIRE RECIPROCAL DISCLOSURE UNDER CIPA WAS HARMLESS CONFLICTS WITH *WARDIUS* v. *OREGON* AND *KOTTEAKOS* v. *UNITED STATES* 22

A. Legal and Procedural Background 22

B. The Court of Appeals Should Have Applied the Harmless Error Standard for Constitutional Errors 25

C. The Court of Appeals Erred in Placing the Burden of Proving Harm from Nonconstitutional Error on North 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases	Page
Arizona v. *Fulminante*, No. 89-839 (U.S. March 26, 1991)	9, 10
Bouie v. *City of Columbia*, 378 U.S. 347 (1964)	16
Carella v. *California*, 109 S. Ct. 2419 (1989)	9, 11, 12, 13
Chapman v. *California*, 386 U.S. 18 (1967)	25, 26
Cheek v. *United States*, 111 S. Ct. 604 (1991)	14, 15, 16, 17, 18, 20, 21
Connecticut v. *Johnson*, 460 U.S. 73 (1983)	9, 10, 13
Cramer v. *United States*, 325 U.S. 1 (1945)	9
Holloway v. *Arkansas*, 435 U.S. 475 (1978)	30
Kastigar v. *United States*, 406 U.S. 441 (1972)	3
Kotteakos v. *United States*, 328 U.S. 750 (1946)	22, 26, 27, 28, 29
Liparota v. *United States*, 471 U.S. 419 (1985)	14, 15, 16, 17, 18, 20, 21
Mauricio v. *Duckworth*, 840 F.2d 454 (7th Cir.), *cert. denied*, 488 U.S. 869 (1988)	22
Rose v. *Clark*, 478 U.S. 570 (1986)	9, 10, 12, 13, 26
Stromberg v. *California*, 283 U.S. 359 (1931)	9
United States v. *Adams*, 759 F.2d 1099 (3d Cir.), *cert. denied*, 474 U.S. 906 (1985)	28
United States v. *Collins*, 720 F.2d 1195 (11th Cir. 1983)	23
United States v. *Dunkel*, No. 89-1841, 1991 U.S. App. LEXIS 3599 (7th Cir. March 8, 1991)	11, 13
United States v. *Farnham*, 791 F.2d 331 (4th Cir. 1986)	28, 29, 30
United States v. *Goetz*, 746 F.2d 705 (11th Cir. 1984)	11
United States v. *Golitschek*, 808 F.2d 195 (2d Cir. 1986)	16
United States v. *Grier*, 866 F.2d 908 (7th Cir. 1989)	28
United States v. *Johnson*, 718 F.2d 1317 (5th Cir. 1983)	12
United States v. *Kerley*, 838 F.2d 932 (7th Cir. 1988)	11
United States v. *Labarbera*, 581 F.2d 107 (5th Cir. 1978)	4

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Lane*, 474 U.S. 438 (1986)	30
United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977)	9
United States v. *McElroy*, 910 F.2d 1016 (2d Cir. 1990)	19
United States v. *Mentz*, 840 F.2d 315 (6th Cir. 1986)	11
United States v. *Pearson*, 746 F.2d 787 (11th Cir. 1984)	4
United States v. *Reeves*, 752 F.2d 995 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985)	17, 20
United States v. *Rhone*, 864 F.2d 832 (D.C. Cir. 1989)	16
United States v. *Rivera*, 900 F.2d 1462 (10th Cir. 1990)	28
United States v. *Singleton*, 532 F.2d 199 (2d Cir. 1976)	12
United States v. *Thomas*, 916 F.2d 647 (11th Cir. 1990)	20
United States v. *White Horse*, 807 F.2d 1426 (8th Cir. 1986)	11
Wardius v. *Oregon*, 412 U.S. 470 (1973)	4, 22, 23, 25, 26, 27

Constitutional and Statutory Provisions

U.S. Const. amend. V	2
7 U.S.C. § 2024(b)(1)	16
18 U.S.C. App. IV § 5(a)	23
18 U.S.C. App. IV § 5(b)	23
18 U.S.C. App. IV § 6(f)	22, 23, 25, 30
18 U.S.C. § 2	2, 5
18 U.S.C. § 201(c)(1)(B)	3, 5
18 U.S.C. § 215(a)	19
18 U.S.C. § 1503	18, 20
18 U.S.C. § 1505	2, 3, 4, 5, 7, 8, 14, 18, 19, 20, 21
18 U.S.C. § 2071(b)	3
18 U.S.C. § 3231	2
26 U.S.C. § 7212(a)	17, 20

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2111	2, 26, 27
Rules	
Fed. R. Crim. P. 30	9
Fed. R. Crim. P. 52(a)	2, 26
Sup. Ct. R. 12.3	2
Other	
Ballentine's Law Dictionary (3d ed. 1969)	19
H. Rep. No. 913, 65th Cong., 3d Sess. (1919)	28

CROSS-PETITION FOR A WRIT OF CERTIORARI

Oliver L. North cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. As set forth in North's opposition to the independent counsel's petition for a writ of certiorari, the judgment of the court of appeals is interlocutory and this Court should therefore deny the independent counsel's petition. *See* Brief in Opposition to Petition for a Writ of Certiorari (filed March 27, 1991). The issues presented in the petition (and in this cross-petition) are appropriately reviewed by this Court, if ever, only after the district court has conducted the *Kastigar* hearing ordered by the court of appeals and determined the extent to which North's immunized testimony was used, directly or indirectly, in the grand jury and at trial. The proceedings ordered by the court of appeals may also moot the questions presented in the petition and in this cross-petition.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-218a) is reported at 910 F.2d 843.[1] The opinion of the court of appeals on rehearing (App. 219a-260a) is reported at 920 F.2d 940. The pertinent opinions of the district court are reported at 698 F. Supp. 316 (Classified Information Procedures Act) (Cross-App. 1a-13a); 708 F. Supp. 399 (Classified Information Procedures Act) (Cross-App. 14a-20a); and 716 F. Supp. 644 (authorization and intent for Count 6) (App. 302a-313a).

---

[1] The appendix that accompanies the independent counsel's petition for a writ of certiorari will be cited as "App."; the appendix filed herewith will be cited as "Cross-App."; and the joint appendix filed in the court of appeals will be cited as "JA."

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1990, and a timely petition for rehearing was denied on November 27, 1990. Cross-petitioner relies on Sup. Ct. R. 12.3. The independent counsel's petition for a writ of certiorari was received on February 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are the Fifth Amendment to the United States Constitution (Cross-App. 21a); 18 U.S.C. § 1505 (Cross-App. 22a); 18 U.S.C. App. IV (Cross-App. 23a); 28 U.S.C. § 2111 (Cross-App. 33a); and Fed. R. Crim. P. 52(a) (Cross-App. 34a).

STATEMENT OF THE CASE

A. Proceedings Below

Oliver North was indicted on March 16, 1988, together with Admiral John Poindexter, Major General Richard Secord (USAF Ret.), and Albert Hakim.[2] The indictment contained 23 counts; 16 named North as a defendant. On June 8, 1988, the district court granted defendants' motions for severance and ordered four separate trials. The independent counsel ("IC") elected to try North first. Following dismissal of four counts, trial began on February 21, 1989. The jury retired for its deliberations on April 20, 1989. On May 4, after twelve days of deliberations, the jury returned verdicts of not guilty on nine counts and guilty on three counts: aiding and abetting an endeavor to obstruct Congress under 18 U.S.C. §§ 1505 and 2 (Count 6); destroying, altering, or removing official NSC documents under 18

[2] The jurisdiction of the district court was founded on 18 U.S.C. § 3231.

U.S.C. § 2071(b) (Count 9); and accepting an illegal gratuity, consisting of a security system for North's home, under 18 U.S.C. § 201(c)(1)(B) (Count 10).[3]

The court of appeals vacated North's three convictions because the district court had failed to comply with the requirements of *Kastigar* v. *United States*, 406 U.S. 441 (1972), and it remanded for a hearing into the use of North's immunized testimony against him in the grand jury and at trial. App. 3a, 44a-45a. In addition, the court of appeals reversed North's conviction on Count 9 because the district court's instructions had improperly restricted the jury's consideration of evidence of authorization relevant to North's intent and had permitted conviction by a nonunanimous jury. App. 3a-4a, 45a-56a, 68a-76a. Chief Judge Wald dissented from each of these rulings. App. 126a-163a.

The court of appeals rejected North's remaining arguments for reversal. Of significance here, the court (1) dismissed as harmless error the district court's directed verdict on an element of the offense charged in Count 6, App. 83a-88a; (2) approved the district court's instruction on the corrupt intent element of 18 U.S.C. § 1505, the statute at issue in Count 6, and its instruction that the jury could consider evidence of authorization as relevant to North's intent on Count 6 only if North "reasonably believed the order was legally proper," App. 61a-68a; and (3) applied the standard for nonconstitutional error and placed the burden of proving harm on North, finding harmless the district court's order compelling North to disclose before trial a 162-page summary of anticipated classified defense testimony, without requiring reciprocal disclosure by the IC, App. 95a-105a.[4]

---

[3] North was sentenced to a three-year suspended term of imprisonment, placed on probation for two years conditioned on performance of 1200 hours of community service, and fined $150,000. He has completed his 1200 hours of community service.

[4] The court of appeals found three additional errors harmless. First, the court found that the district court's order quashing

Judge Silberman dissented from each of these rulings. First, he noted the uniform rule that "reversal is automatically required when the judge, as here, directs a verdict on an essential element of a crime." App. 209a. Second, he declared that the majority's construction of the intent requirement in 18 U.S.C. § 1505 improperly "renders the word 'corruptly' meaningless," App. 191a, and he also rejected the district court's objective reasonableness limitation on the jury's consideration of evidence of authorization, App. 190a. Third, he concluded that the district court's order compelling North to disclose anticipated classified defense testimony before trial, without requiring reciprocal disclosure, violated North's right to due process of law, as recognized in *Wardius* v. *Oregon*, 412 U.S. 470 (1973). Applying the harmless error standard applicable to *constitutional* error, and considering the full range of harm to North, Judge Silberman concluded that "the prejudicial effect of the error committed here is clear." App. 172a.

The IC filed a petition for rehearing with a suggestion for rehearing en banc. The panel withdrew the portion of its prior opinion concerning the absence of a specific unanimity instruction, but it denied the IC's petition in all other respects. Chief Judge Wald again dissented. App. 219a-255a. The court of appeals declined to re-

---

North's subpoena to former President Reagan "amounted to at worst harmless error." App. 83a & n.25. Second, although the court found two portions of the IC's closing argument to be "clearly improper," it concluded that "neither was sufficiently prejudicial to North as to warrant the reversal of any or all of his convictions." App. 88a. Third, the court intimated that the district court's special verdict form, requiring a total of 19 not-guilty verdicts to acquit on the 12 counts, was improper, but it declined to reverse North's convictions on that ground. App. 119a-121a.

Despite finding a range of errors, the panel majority failed to discuss whether the errors, even if individually harmless, were in combination sufficiently prejudicial to require reversal. *See, e.g.*, *United States* v. *Pearson*, 746 F.2d 787, 796 (11th Cir. 1984); *United States* v. *Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978).

hear the case en banc, with Chief Judge Wald dissenting alone with respect to the *Kastigar* issues and dissenting with Judge Ruth B. Ginsburg with respect to the issue of authorization and intent on Count 9. App. 256a-259a.

On February 25, 1991, the IC petitioned this Court for a writ of certiorari. The IC's petition challenges only the court of appeals' rulings on North's immunized testimony; it does not seek review of the court's reversal of North's conviction on Count 9.

B. The Charges Remaining Against North

Following North's acquittal on nine counts and the court of appeals' reversal of North's conviction on Count 9, two counts remain at issue: Count 6, which alleges that North aided and abetted an endeavor to obstruct Congress in violation of 18 U.S.C. §§ 1505 and 2, and Count 10, which alleges that North accepted an illegal gratuity in violation of 18 U.S.C. § 201(c)(1)(B).

1. Count 6.—Count 6 charged that in November 1986 North endeavored to obstruct congressional inquiries into the sale of arms to Iran and into United States government support for the Contras by (a) preparing an internal Executive Branch chronology of the Iran initiative that, in its latest draft, denied any U.S. involvement in the November 1985 shipment of HAWK missiles from Israel to Iran; and (b) altering, destroying, concealing, and removing NSC and NSC staff documents. North was found not guilty as a principal, but guilty under 18 U.S.C. § 2. JA 691.

The first allegation concerned a chronology of the Iran initiative that National Security Advisor Poindexter directed North to develop in early November 1986, after the initiative was first publicly disclosed. JA 251-52, 1532, 1664. In mid-November 1986, two congressional committees announced that they wanted Poindexter and Director of Central Intelligence William Casey to appear

before the committees on November 21, 1986. Count 6 charged that North, "in preparation for" their appearances, endeavored to obstruct the committees by participating in the preparation of the chronology.

At the time he drafted the chronology, North understood that the President and his top advisors had decided that U.S. involvement in the 1985 HAWK shipment should not be disclosed. JA 1536-46, 1552, 1668, 1671-73.[5] To protect continuing negotiations with Iran concerning the release of U.S. hostages, the President and Poindexter both had denied any such role in public statements and in briefings to Congress. JA 1057-60, 1550-51, 1557, 1666, 2736, 2983, 2985, 3582. Similarly, Robert McFarlane—who had directed North to assist with the 1985 HAWK shipment—denied knowledge of it in November 1986, and actually sat down at North's PROFs machine and deleted the shipment from a draft of the chronology. JA 1072, 1536-38, 1667-68, 1672.

Count 6 also charged that between November 21, 1986 and November 25, 1986, North and others altered, destroyed, concealed, and removed NSC and NSC staff documents concerning the Iran initiative and support for the Contras. JA 252-53. In response to North's pretrial request for particulars, the IC limited the allegations of alteration to five specific documents relating solely to Contra support.[6] North testified that he had destroyed

---

[5] The involvement of the U.S. in the November 1985 HAWK shipment was one of the most sensitive aspects of the Iran initiative. The Iranians were angered because the missiles had Israeli markings and did not perform as the Iranians had expected. JA 1486-87. To prevent the Iranians from blaming the U.S. for the faulty missiles (with the accompanying danger to the American hostages), North and others consistently denied in negotiations with the Iranians that the U.S. had had any role in the November 1985 HAWK shipment. JA 1533-34, 1668.

[6] *See* Letter from Associate IC Zornow to defense counsel, at 6, Aug. 10, 1988 (attached as Exhibit A to Motion for a Bill of Particulars (Defendant's Pretrial Motion Number 52) (filed Oct. 11, 1988)).

and altered documents believing that his conduct was lawful and authorized by his superiors. JA 1456-62, 1558-59, 1579-83, 1625-36. He also testified that his removal of copies of documents from the NSC on November 25, 1986 was based on the advice of prior counsel, that his purpose was to preserve documents demonstrating that his superiors knew about and authorized his conduct in connection with the two covert operations, and that he returned all of the documents on December 2, 1986, after retaining his present counsel. JA 1562-70, 2768, 2892.

2. Count 10.—Count 10 involved a security system installed at North's home following a threat on his life by the terrorist Abu Nidal. It alleged that North accepted the system "for and because of" official acts performed or to be performed on behalf of Secord. JA 262. North testified that he accepted the security system because he was concerned for the safety of his family, that he did not accept it for or because of any official act, and that he did not view it as compensation for official acts. JA 1510.

REASONS FOR GRANTING THE WRIT

I. THE MAJORITY'S HOLDING THAT THE DISTRICT COURT'S PARTIAL DIRECTED VERDICT ON COUNT 6 WAS HARMLESS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The court of appeals held that a directed verdict on an essential element of an offense can constitute harmless error. That holding conflicts directly with at least two decisions of this Court and decisions by at least four other courts of appeals.

The statute at issue in Count 6—18 U.S.C. § 1505—requires proof that a congressional "inquiry or investigation [was] being had." Whether such an inquiry was

"being had" is a question for the jury; both the IC and North submitted proposed jury instructions dealing with this element of the offense. App. 84a; JA 2434, 2468-70. Nevertheless, the district court instructed the jury "as a matter of law" that "inquiries were pending" and told the jury that "[y]ou need only deliberate regarding the other three elements." App. 84a; JA 545-46.

The panel majority acknowledged that the district court's directed verdict on an essential element of the offense was error, but it held that the error was harmless. App. 84a-88a. The majority explained:

> Since the jury had to find all of the *other* elements of a violation of 18 U.S.C. § 1505—whether North knew of the pending inquiries, whether he endeavored to obstruct them, and whether he did so with requisite criminal intent, *see* JA at 635—the instruction imposed no conclusive presumption of guilt . . . and left the jury, rather than the judge, as the ultimate arbiter of whether North violated 18 U.S.C. § 1505 . . . .

App. 85a (emphasis added) (citations omitted). Because the jury was required to find *three* elements of the offense, the court of appeals excused the district judge's directed verdict on the *fourth* element.[7]

---

[7] The panel majority believed that North had admitted in his trial testimony "that congressional inquiries were in fact pending in November 1986." App. 86a. But Count 6 charged that North aided and abetted an endeavor to obstruct *two* congressional inquiries, one into arms sales to Iran and the other into efforts by the United States government to aid the Contras. JA 251-53. North's testimony concerned only his knowledge of the Iran inquiry; as Judge Silberman noted, there is a serious question whether an inquiry was pending into Contra support in November 1986, when the so-called Contra support documents were allegedly altered. App. 215a-217a. The jury's verdict on Count 6 does not disclose whether it found that North aided and abetted an endeavor to obstruct an *Iran* inquiry, a *Contra support* inquiry, or both. Because North's conviction on Count 6 could have rested solely on the charged obstruction of an alleged Contra support inquiry, the conviction must be reversed. *See, e.g.*,

The panel majority's holding is directly contrary to this Court's decision in *Rose* v. *Clark*, 478 U.S. 570 (1986). In *Rose*, the Court made clear that harmless error analysis does not apply to certain errors—including "'entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction.'" *Id.* at 578 (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)); *see also Connecticut* v. *Johnson*, 460 U.S. 73, 84, 87-88 (1983) (plurality opinion) (conclusive presumption, like a directed verdict, "deprived respondent of constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error") (quotation omitted); *id.* at 95-97 (Powell, J., joined by Burger, C.J., Rehnquist & O'Connor, JJ., dissenting) (plurality incorrectly equated conclusive presumption, which should be subject to harmless error analysis, with directed verdict, which cannot be harmless).[8]

Cramer v. *United States*, 325 U.S. 1, 36 n.45 (1945); *Stromberg* v. *California*, 283 U.S. 359, 368 (1931).

Inexplicably, the panel majority suggested that the issue whether an inquiry was pending into Contra support was a "'Johnny-come-lately,' for North himself made no mention of the subject of the investigation in his proposed jury instructions." App. 88a n.30. In fact, North objected to the district court's instruction precisely as Fed. R. Crim. P. 30 contemplates. As Judge Silberman recognized, "[w]hen North objected to this particular instruction his counsel said, 'We object to the finding as a matter of law and particularly because we believe there's no evidence that there was a Contra investigation underway in November 1986.' (Tr. 8499; J.A. 1830). He could hardly have been clearer." App. 216a.

[8] In *Arizona* v. *Fulminante*, No. 89-839 (U.S. March 26, 1991), this Court declared that "structural defects in the constitution of the trial mechanism . . . defy analysis by 'harmless-error' standards," while "trial error" *can* be subjected to harmless error analysis. Slip op. at 8. A directed verdict on an essential element of the offense is plainly a "structural defect," since in that case "the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578; *see Carella* v. *California*, 109 S. Ct. 2419, 2422 (1989) (Scalia, J., joined

Contrary to the panel majority's conclusion, App. 85a, *Rose* did not reject harmless error analysis solely with respect to cases in which the trial judge directs an ultimate verdict of guilty; the distinction the Court drew was between (1) instructions that shift the burden of proof (which are subject to harmless error analysis), and (2) instructions that preclude the jury from considering an element of the offense (which are not subject to harmless error analysis). The Court stated: " 'Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering *an issue*.' " *Rose*, 478 U.S. at 580 n.8 (emphasis added) (quoting *Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting)). The instruction at issue here prevented the jury from considering "an issue"—whether an inquiry was "being had"—and it therefore cannot be harmless.[9]

With the exception of the court of appeals in this case, the federal appellate courts to consider the issue have concluded that a directed verdict on an element of an offense cannot be harmless. As the Eleventh Circuit

---

by Brennan, Marshall & Blackmun, JJ., concurring) (declaring that right to a jury trial violated by directed verdict for the government "is a structural guarantee"). The dissenting Justices in *Fulminante* reaffirmed that "a judge in a criminal trial is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." Slip op. at 13 (dissenting op. of White, Marshall, Blackmun & Stevens, JJ.) (quotation omitted).

[9] As Judge Silberman observed,

> [T]he Court applied the harmless error analysis in *Rose* since, "the jury . . . found . . . every fact necessary to establish every element of the offense beyond a reasonable doubt." [*Rose*, 478 U.S.] at 581 (internal quotes omitted). That is not true here, where the trial court instructed the jury that one element of the offense has been established as a matter of law.

App. 210a-211a.

declared, "a trial court's actions in directing a verdict in a criminal trial, either in whole or in part, cannot be viewed as harmless error." *United States* v. *Goetz*, 746 F.2d 705, 709 (11th Cir. 1984); *see, e.g., United States* v. *Dunkel*, No. 89-1841, 1991 U.S. App. LEXIS 3599, *4 (7th Cir. March 8, 1991) (because an instructional error "removed from the jury's purview one of the elements of the offense . . . [i]t follows that the error cannot be harmless"); *United States* v. *Mentz*, 840 F.2d 315, 324 (6th Cir. 1988) (district court's directed verdict on an element of the offense "cannot be deemed harmless"); *United States* v. *Kerley*, 838 F.2d 932, 937 (7th Cir. 1988) ("[T]he harmless-error doctrine . . . does not apply when the judge directs a partial verdict against the defendant by telling the jury that one element of the crime . . . has been proved beyond a reasonable doubt . . . ."); *United States* v. *White Horse*, 807 F.2d 1426, 1429 (8th Cir. 1986) (when trial court directs verdict on essential element, "[i]t makes no difference that the evidence supporting proof of that element is overwhelming, for it is the jury's role, not the judge's, to find the facts essential to a criminal conviction") (quotation and citation omitted).

The panel majority believed that it could disregard these cases because, in its view, this Court had established a new harmless error regime in *Carella* v. *California*, 109 S. Ct. 2419 (1989). App. 85a-87a & n.28.[10]

---

[10] The panel majority also attempted to distinguish decisions by other courts of appeals on the ground that "[i]n none of these cases . . . was the undisputed fact found by the trial judge a logical prerequisite for the jury's finding of the other elements of the crime . . . ." App. 87a n.28. This attempted distinction is without merit for three reasons. First, the "fact found by the trial judge" in this case—that inquiries were pending—was not undisputed. *See supra* note 7. Second, whether the fact found by the district court was a "logical prerequisite" for the jury's other findings is irrelevant; the crucial point is that the district court's instruction *precluded* the jury from determining whether an inquiry was "being had." Thus, the court's erroneous instruction "prevent[ed the] jury from con-

Carella involved a presumption; it did not involve a directed verdict on an element of the offense. As Judge Silberman declared, "the Majority simply ignores the distinction between the error of shifting the burden of proof at issue in *Carella* and the blatant directed verdict at issue here." App. 212a.

Both the majority in *Carella* and the four-Justice concurrence were careful to distinguish the presumption at issue there from a directed verdict. The majority took pains to note that in *Rose* the Court had expressly distinguished a burden-shifting presumption from a directed verdict. *See Carella*, 109 S. Ct. at 2421. Justice Scalia's concurrence, joined by Justices Brennan, Marshall, and Blackmun, declared that "[a] defendant may assuredly insist upon observance of [the right to trial by jury] even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State." *Id.* at 2422. In a passage that directly undercuts the panel majority's reading of *Carella*, the four Justices declared:

> These principles necessarily circumscribe the availability of harmless-error analysis when a jury has been instructed to apply a conclusive presumption.

---

sidering an issue," and that instruction therefore cannot be harmless. *Rose*, 478 U.S. at 580 n.8 (quotation omitted).

Third, other courts of appeals have expressly rejected the panel majority's apparent position that a directed verdict on one element of an offense can be cured by the jury's finding on a related element. *See, e.g., United States* v. *Johnson*, 718 F.2d 1317, 1323 (5th Cir. 1983) (en banc) (district court instructed jury as a matter of law that "Gold Certificate" was a security; in reversing conviction, court of appeals rejects contention that submission of the issue of defendant's knowledge cured the error); *United States* v. *Singleton*, 532 F.2d 199, 206-07 (2d Cir. 1976) (submission of issue whether defendant knew checks were stolen did not cure court's comment that "it was 'clear' that the checks were recently stolen"; plain error to take from jury issue whether checks in fact were stolen).

> If the judge in the present case had instructed the jury, "You are to apply a conclusive presumption that Carella embezzled the rental car if you find that he has blue eyes and lives in the United States," it would not matter, for purposes of assuring Carella his jury-trial right, whether the record contained overwhelming evidence that he in fact embezzled the car. For nothing in the instruction would have directed the jury, or even permitted it, to consider and apply that evidence in reaching its verdict. And the problem would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. *As with a directed verdict, "the error in such a case is that the wrong entity judged the defendant guilty."*

Id. (quoting *Rose*, 478 U.S. at 578) (emphasis added); *see Dunkel, supra*, 1991 U.S. App. LEXIS 3599, *4 (citing *Carella* concurrence for proposition that taking an element of an offense from the jury cannot be harmless). In light of the quoted language from the majority and concurring opinions in *Carella*, there is no basis for the panel majority's interpretation of the case. Although *Carella*, *Rose*, and *Johnson* reflect disagreement among the Justices over the application of harmless error analysis to presumptions, no Justice in any of those cases questioned the principle that a directed verdict on an essential element of an offense cannot be harmless.

The panel majority's holding that harmless error analysis could be applied to a partial directed verdict conflicts with this Court's rulings in *Rose* and *Carella* and with the decisions of the other courts of appeals to address the question. If the Court grants the IC's petition, it should grant the cross-petition as well.

II. THE MAJORITY'S HOLDING ON INTENT AND AUTHORIZATION UNDER 18 U.S.C. § 1505 CONFLICTS WITH THIS COURT'S DECISIONS IN *CHEEK* v. *UNITED STATES* AND *LIPAROTA* v. *UNITED STATES*

North contended in part on Count 6 that he did not act "corruptly," as 18 U.S.C. § 1505 requires, because he believed that his conduct was lawfully authorized by his superiors, including President Reagan, National Security Advisor Poindexter, and Director of Central Intelligence Casey. The district court undermined this defense through two critical instructions. First, it rejected North's requested instruction requiring proof of knowledge of illegality under § 1505. Instead, the court instructed the jury on the "corruptly" element that North must have had "the bad purpose to act in the precise manner the statute was intended to prevent. That is, to obstruct or to try to obstruct an inquiry or proceeding." JA 574. Second, the court instructed the jury that it could consider evidence of authorization as relevant to North's intent only if North "*reasonably* believed the order was legally proper." JA 573 (emphasis added).[11]

The court of appeals' decision approving these instructions conflicts with *Cheek* v. *United States*, 111 S. Ct. 604

---

[11] The district court further instructed the jury that authorization was relevant to intent *only* if "no alternative was available to [North] to comply with [his] orders by other lawful means." It prohibited the jury from considering evidence of authorization if North had a lawful alternative: "[I]f an authorization can be satisfied by two different courses of action, one clearly legal and one illegal *or of dubious legality* and a person chooses the illegal or dubious course when other legal action would comply, *authorization cannot be viewed as affecting intent.*" JA 572-73 (emphasis added). As Judge Silberman observed, under this "most damaging instruction . . . it is not even necessary for the defendant to be aware that the clearly legal course of action was available to him." App. 190a. These instructions (especially when read in conjunction with the instruction requiring that North "reasonably believe[]" in the legality of his authorization) constitute error.

(1991), and *Liparota* v. *United States*, 471 U.S. 419 (1985). These decisions make clear that specific intent for serious federal offenses that embrace some apparently innocent conduct requires proof of subjective knowledge of wrongfulness or illegality. The panel majority's holding undermines the fundamental principle that a person must have notice that his conduct is wrongful before he can be subjected to serious punishment for his acts.

A. Under *Cheek* and *Liparota*, Serious Federal Offenses That Penalize a Range of Apparently Innocent Conduct Require Subjective Knowledge of Wrongfulness or Illegality

In *Cheek*, involving tax offenses, the district court instructed the jury that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness," and it precluded the jury from considering evidence of Cheek's objectively unreasonable belief that his actions were lawful. 111 S. Ct. at 608 (quoting district court instruction). This Court vacated Cheek's convictions. It noted that for purposes of tax offenses, "[w]illfulness . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 610. Accordingly, the government must prove that the defendant was *actually aware* of the legal duty at issue, "which cannot be true if the jury credits a good-faith misunderstanding and belief submission, *whether or not the claimed belief or misunderstanding is objectively reasonable.*" *Id.* at 611 (emphasis added).

Because this Court found that willfulness must be determined by a subjective rather than an objective standard, it held that the jury should have been permitted to consider evidence supporting Cheek's claim that he lacked awareness of the asserted legal duty, even if such a lack of awareness was objectively unreasonable. "[I]t is not contrary to common sense, let alone impossible, for a de-

fendant to be ignorant of his duty based on an irrational belief that he has no duty, *and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision.*" *Id.* (emphasis added). Accordingly, "[i]t was . . . error to instruct the jury to disregard evidence of Cheek's understanding [of the tax laws], as incredible as such misunderstandings of and beliefs about the law might be." *Id.*

Although *Cheek* is a tax case, its basic principle—that to prove specific intent the government must establish that the defendant had actual knowledge that he was violating a legal duty—applies to other federal offenses that penalize a range of apparently innocent conduct. In *Liparota*, for example, this Court declared that under 7 U.S.C. § 2024(b)(1), the food stamp fraud statute, "the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations." 471 U.S. at 433. The Court found this construction of the statute "particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* at 426.[12]

Cheek and *Liparota* rest upon the requirement that a person have notice that his conduct is wrongful before he is punished for violating the law. It is fundamental that "a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie* v. *City of Columbia*, 378 U.S. 347, 350 (1964). If a statute penalizes conduct that does not otherwise appear wrongful, then a requirement of

---

[12] The courts of appeals have similarly required proof of subjective knowledge of illegality or wrongfulness for federal statutes that provide serious penalties for some apparently innocent conduct. *See, e.g., United States* v. *Rhone*, 864 F.2d 832, 835-37 (D.C. Cir. 1989) (mail fraud and theft charges require proof of subjective knowledge of illegality); *United States* v. *Golitschek*, 808 F.2d 195, 202-03 (2d Cir. 1986) (charges of conspiracy and wire fraud arising out of arms exports "require[] knowledge of a legal obligation").

subjective knowledge of wrongfulness or illegality ensures that only those with notice that their conduct is proscribed will be punished. *See, e.g., United States* v. *Reeves*, 752 F.2d 995, 999-1000 (5th Cir.) (construing term "corruptly" in 26 U.S.C. § 7212(a) "to specifically insure that potential violators will be on notice of what constitutes corrupt behavior under section 7212(a)"), *cert. denied*, 474 U.S. 834 (1985).

In *Cheek*, for example, this Court rested its interpretation of the term "willfully" on the fact that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." 111 S. Ct. at 609. Similarly, in *Liparota* this Court observed that

> [a] strict reading of the statute with no knowledge-of-illegality requirement would . . . render criminal a food stamp recipient who, for example, used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants. Such a reading would also render criminal a nonrecipient of food stamps who "possessed" stamps because he was mistakenly sent them through the mail due to administrative error, "altered" them by tearing them up, and "transferred" them by throwing them away.

471 U.S. at 426-27. The *Liparota* Court applied the "rule of lenity," which mandates that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," because application of the rule "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Id.* at 427. *Cheek* and *Liparota* underscore the principle that, where possible, criminal statutes should be construed to require knowledge of wrongfulness or illegality when necessary to en-

sure that potential violators have notice that their conduct is prohibited.

B. The Panel Majority's Holding on Intent and Authorization Under 18 U.S.C. § 1505 Conflicts with the Requirement of Fair Notice Recognized in *Cheek* and *Liparota*

The panel majority's decision conflicts with *Cheek* and *Liparota*. The district court's instruction on the term "corruptly" in § 1505, and its objective reasonableness limitation on evidence of authorization as relevant to intent, violated the principle recognized in those cases that federal statutes which penalize some apparently innocent conduct should be construed to require proof of subjective knowledge of wrongfulness or illegality.

The panel majority initially appeared to acknowledge that the district court's construction of the "corruptly" element would subject some persons to punishment without notice that their conduct was wrongful. The majority noted that in interpreting the word "corruptly" in 18 U.S.C. § 1505 and in 18 U.S.C. § 1503 (prohibiting obstructions of judicial proceedings) some courts "have said that the word 'corruptly' means nothing more than an intent to obstruct the proceeding." App. 63a. The majority initially rejected this interpretation of "corruptly" in § 1505, because "to assert that all endeavors to influence, obstruct or impede the proceedings of congressional committees are, as a matter of law, corrupt . . . *would undoubtedly criminalize some innocent behavior.*" App. 64a (emphasis added).[13] The majority acknowledged

[13] The majority distinguished § 1505 from 18 U.S.C. § 1503, which prohibits corrupt endeavors to obstruct judicial proceedings. Because "very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap immediately to mind," the panel majority concluded that a presumption that an endeavor to obstruct a judicial proceeding is corrupt "may well be warranted." App. 63a. But the majority initially declined to "import that legal presumption to section 1505," because to do so would criminalize some innocent behavior. App. 64a.

that "[n]o one can seriously question that people constantly attempt, in innumerable ways, to obstruct or impede congressional committees," and it posited the examples of an executive branch official asking a committee chairman to call off an investigation designed to embarrass the President and a political activist informing his representative that he would oppose her reelection unless she stopped pursuing a particular investigation. App. 64a. The dissent offered additional examples of lawful endeavors to impede congressional inquiries. App. 182a.

But after concluding that § 1505 would criminalize some apparently innocent conduct if the "corruptly" element required only the intent to obstruct an inquiry, as the district court instructed the jury, the panel majority did an about-face and approved that very instruction. Although the majority stated that the word "corruptly" in § 1505 "[is] to be understood according to [its] common meaning[]," App. 68a, it ultimately disregarded that meaning. According to the majority, one "common meaning" of a corrupt intent is " 'the intent to obtain an *improper* advantage for [one]self or someone else, inconsistent with official duty and the rights of others.' " App. 63a (quoting *Ballentine's Law Dictionary* 276 (3d ed. 1969)) (emphasis added).[14] That is a far cry from the district court's instruction, approved by the majority, that "corruptly" means with "the bad purpose . . . to obstruct or to try to obstruct an inquiry or proceeding." JA 574.[15]

---

[14] Similarly, the Second Circuit recently declared that the word "corruptly" is "ordinarily understood as referring to acts done voluntarily and intentionally and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful means." *United States* v. *McElroy*, 910 F.2d 1016, 1021 (2d Cir. 1990) (quotation omitted) (construing 18 U.S.C. § 215(a)).

[15] On the basis of its erroneous construction of § 1505, the panel majority also approved the district court's objective reasonableness limitation on evidence of authorization. The panel declared that "[b]ecause the District Court had correctly defined for the jury the

In fact, as the majority's analysis (but not its result) demonstrates, "when a defendant is accused under section 1505 of corruptly endeavoring to obstruct a congressional committee, the word 'corruptly' in the statute requires the prosecution to show something beyond a mere intent to obstruct the committee." App. 184a. The requirement that the government prove "something beyond" a mere intent to obstruct is essential to ensure that potential violators of § 1505 have notice that their conduct is prohibited.[16] Absent such an intent requirement, § 1505 would "criminalize a broad range of apparently innocent conduct," including the lawful endeavors to obstruct congressional inquiries posited by the panel majority and the dissent. *Liparota*, 471 U.S. at 426; *cf. Reeves*, 752 F.2d at 1001-02 (26 U.S.C. § 7212(a), forbidding "corrupt[]" endeavors to obstruct or impede administration of the tax laws, requires proof that the defendant intended "to secure an unlawful advantage or benefit" to himself or others, to ensure that potential violators know whether their conduct is prohibited).[17]

---

required intent, and because 'corruptly' and the other words in the statute are to be understood according to their common meanings, necessitating no specific definitional instructions from the court, we see no way in which the evidence of authorization would bear on the decisions the jury was required to make." App. 68a.

[16] Even under 18 U.S.C. § 1503, which covers little or no apparently innocent conduct, App. 63a-64a, the government must "establish that the conduct was prompted, at least in part, by a corrupt motive." *United States* v. *Thomas*, 916 F.2d 647, 651 (11th Cir. 1990) (quotation omitted).

[17] Indeed, the conclusion in *Cheek* and *Liparota* applies with particular force here. The conduct at issue in those cases—blatant tax violations in *Cheek* and food stamp fraud in *Liparota*—was clearly unlawful. By contrast, the destruction, alteration, and removal of documents at issue at Count 6 was *not* unlawful in itself; "[g]overnment officials, particularly those who deal with security matters, often shred documents as a matter of course—to do otherwise might create serious dangers or, in some circumstances, violate the law." App. 189a.

The determination whether North's intent was "corrupt[]"—like the determination in *Cheek* and *Liparota* whether the defendants in those cases acted with specific intent—should have focused on North's *subjective* knowledge of illegality. *Cheek* and *Liparota* make clear that the district court should have instructed the jury that Count 6 required proof that North knew his conduct was unlawful, and the court should have permitted the jury to consider *all* evidence of authorization in determining North's intent, whether or not North's belief that his conduct was lawfully authorized was reasonable.[18]

---

[18] The panel majority's erroneous construction of the term "corruptly" in 18 U.S.C. § 1505 led to a further error. The majority concluded that the district court properly quashed North's subpoena to former President Reagan, reasoning that § 1505 does not require proof of knowledge of illegality, and that evidence of authorization —including the testimony that North proffered from former President Reagan—was therefore irrelevant to North's intent. App. 78a-80a. But under a proper construction of the term "corruptly," the proffered testimony from Mr. Reagan was directly relevant to North's belief that his conduct was authorized. Judge Silberman succinctly described the impact of the district court's order quashing North's subpoena to Mr. Reagan:

> North worked in the White House, only one step removed from the President himself, with what appears to have been enormous responsibility. He has been convicted of violating criminal statutes (never before employed as here) and his defense is that he was *lawfully* doing the President's bidding, and doing so with regard to a substantive area of national security policy, which, whatever one's view of those policies, would have been thought at the core of the Chief Executive's constitutional responsibility. His immediate superior, Admiral Poindexter, was unavailable as a defense witness. Under these circumstances, for the trial judge to have refused to compel Reagan's testimony, was to deprive North of a fair trial.

App. 207a-208a (emphasis in original).

III. THE MAJORITY'S HOLDING THAT THE DISTRICT COURT'S REFUSAL TO REQUIRE RECIPROCAL DISCLOSURE UNDER CIPA WAS HARMLESS CONFLICTS WITH *WARDIUS* v. *OREGON* AND *KOTTEAKOS* v. *UNITED STATES*

The court of appeals declined to reverse North's convictions based on the district court's erroneous failure to enforce the reciprocal disclosure requirement of § 6(f) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. IV § 6(f), because it found that "North fail[ed] to demonstrate how he was surprised or prejudiced by prior unawareness of any of the evidence presented by the IC at trial to 'refute' his defenses." App. 103a. If the Court grants the IC's petition, it should review this holding as well for two reasons. First, by applying the relaxed harmless error standard for *nonconstitutional* error, the court of appeals' decision conflicts with *Wardius* v. *Oregon*, 412 U.S. 470 (1973), which held that compelling nonreciprocal disclosure by a defendant violates the constitutional right of due process. Second, by placing the burden of establishing prejudice on North rather than the IC, the court of appeals' decision conflicts with *Kotteakos* v. *United States*, 328 U.S. 750 (1946). The burden of proof issue presents an important question that has produced a division in the courts of appeals and warrants resolution by this Court.

A. Legal and Procedural Background

In *Wardius*, this Court held that due process "forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." 412 U.S. at 472. When the trial court "permit[s] the [government] access to information it d[oes] not also afford [the defendant], full reciprocity, as mandated by *Wardius*, cannot be said to have characterized the discovery process and consequently due process [is] denied." *Mauricio* v. *Duckworth*, 840 F.2d 454, 459 (7th Cir.), *cert. denied*, 488 U.S. 869 (1988).

CIPA requires the defendant to give pretrial notice of all classified information that he "reasonably expects to disclose or to cause the disclosure of" at trial. 18 U.S.C. App. IV § 5(a).[19] To meet the reciprocity requirement of *Wardius*, the statute provides that the district court "shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information" that the court finds to be relevant and admissible. *Id.* § 6(f); *see United States* v. *Collins*, 720 F.2d 1195, 1200 (11th Cir. 1983) (relying in part on § 6(f) in holding CIPA constitutional on its face).

North moved in April 1988 for an order declaring CIPA unconstitutional as applied to this case involving an unprecedented amount of classified material. He contended, *inter alia*, that the pretrial notice provision of CIPA would violate his right to due process under *Wardius* by forcing him to make a massive nonreciprocal pretrial disclosure.[20] In addressing North's motion, the district court recognized the extent to which classified information permeated the case:

> Some of the witnesses and defendants, particularly defendant North, operated from secure locations in the White House with full access to the most sensitive information and most critical national security intelligence methods and sources available to the government. This information, and even some methods and sources, are inextricably enmeshed in the events challenged by the indictment.

Cross-App. 6a. The court concluded that "[i]t probably was never contemplated that classified information prob-

---

[19] Classified information not included in a pretrial notice may be excluded from evidence at trial. 18 U.S.C. App. IV § 5(b).

[20] North also contended that the statute would violate his Fifth and Sixth Amendment rights by forcing him to disclose pretrial his own anticipated classified testimony, and that it would violate his Sixth Amendment right to confront and cross-examine witnesses by forcing him to disclose pretrial his own anticipated classified questions and the witnesses' anticipated classified answers.

lems of this magnitude would be presented to a trial judge in a single case." Cross-App. 7a. In light of North's constitutional arguments, which the district court found to have "considerable force," Cross-App. 9a, the court ruled in part that it would "at no time review in advance . . . the subject matter to be covered by defense witnesses," Cross-App. 11a.

On November 23, 1988, the district court abruptly changed course and required North to furnish a CIPA § 5 notice by December 19 "for any and all . . . classified testimonial information." JA 418. The court directed that "this CIPA § 5 notice shall initially be filed *in camera, ex parte.*" JA 418.

On December 19, North filed *in camera* and *ex parte* his Third CIPA § 5 Notice (Testimony). JA 3393-3555. The 162-page document detailed both the general subjects about which the defense reasonably expected to elicit classified testimony from its witnesses, and numerous specific examples of that information. On December 23, the district court overruled North's objections to pretrial disclosure of the notice and ordered that it be transmitted to the IC. Cross-App. 14a-18a.[21] The district court acknowledged that "[a] substantial portion of [North's notice] contain[ed] relevant and material facts and information of value to the defendant" and "contain[ed] references to many pertinent facts and circumstances which the Court believes are likely to alert Independent Counsel to aspects of issues not previously brought to his attention." Cross-App. 15a. After receiving North's 162-page notice, the IC dropped two especially weak charges, shifted its theories of prosecution, withdrew documents and witnesses, and shaped

---

[21] North filed a petition for a writ of mandamus and/or prohibition. On January 4, 1989, the court of appeals denied North's petition, but recognized that North had "raise[d] serious claims that he will suffer deprivation of constitutional rights" and had "raise[d] issues of first impression" concerning CIPA, "which has been infrequently tested through judicial review." JA 721.

its opening statement in light of North's compelled disclosures.

On February 20, 1989, North moved the district court for an order under CIPA § 6(f) and *Wardius* requiring, *inter alia*, disclosure of information that the IC expected to use to rebut the classified information in North's CIPA § 5 notices that the district court had ruled admissible. Although the district court had compelled North to make unprecedented pretrial disclosures under CIPA § 5, *the court ignored North's motion for reciprocal disclosure under CIPA § 6(f).* App. 101a-103a.

On appeal, the panel majority concluded that "the District Court erred in its handling of North's section 6(f) motion. . . . In our view, ignoring a statutorily sanctioned claim for reciprocal disclosure, without a finding that the interests of fairness do not require that disclosure, is error." App. 102a-103a. Nevertheless, even though the IC never raised the issue of harmless error, the majority held that the district court's error was harmless because "North fail[ed] to demonstrate how he was surprised or prejudiced by prior unawareness of any of the evidence presented by the IC at trial to 'refute' his defenses." App. 103a.

B. The Court of Appeals Should Have Applied the Harmless Error Standard for Constitutional Errors

The panel majority's harmless error analysis is erroneous because it applied the relaxed standard for non-constitutional error, rather than the heightened standard for errors of constitutional magnitude. When the district court commits an error that violates the defendant's constitutional rights, reversal is required unless the government can demonstrate that the error was harmless beyond a reasonable doubt. *See Chapman* v. *California*, 386 U.S. 18, 24-26 (1967).[22] By contrast, when the dis-

[22] Some constitutional errors require per se reversal, without any harmlessness inquiry. As discussed above, for example, a directed verdict can never be treated as harmless. Similarly, complete denial

trict court commits an error that does *not* violate the defendant's constitutional rights, reversal is required if the error had a "substantial influence" on the outcome of the trial or leaves the appellate court with "grave doubt" as to whether it had such an effect. *Kotteakos*, 328 U.S. at 765; *see* Fed. R. Crim. P. 52(a); 28 U.S.C. § 2111.

The majority's conclusion that the error was not of constitutional dimension conflicts with *Wardius*. As Judge Silberman declared in dissent, "North was required to disclose an enormous portion of his case, under a regime where he got nothing in return. *Wardius* forbids forced disclosure by defendants under those circumstances." App. 171a. The majority's apparent conclusion that *Wardius* was satisfied because North received *other* discovery, App. 98a n.36, 104a, misses the key point of that case: "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning *refutation of the very pieces of evidence which he disclosed to the State.*" *Wardius*, 412 U.S. at 476 (emphasis added). Because the district court refused to order reciprocal disclosure, North was subjected to the "hazard of surprise" concerning "refutation of the very pieces of evidence which he disclosed" to the IC. In light of this constitutional error, the IC should have been required under *Chapman* to demonstrate beyond a reasonable doubt that the error was harmless. App. 172a.

The majority further erred in focusing its harmless error analysis solely on whether North was "surprised" by the IC's undisclosed rebuttal evidence, while ignoring the harm to North caused by the pretrial disclosure of his own case. "Surprise" is one type of harm caused by a refusal to require reciprocal disclosure, but it is not the only type of harm; rather, "prejudice is measured *both* from North's disclosure to the IC (as to which North was surely harmed) *and* from the failure of the

---

of the right to counsel and decision by a biased judge can never be harmless. *See Rose*, 478 U.S. at 577.

IC to make the required disclosures." App. 173a (emphasis added).[23] The harm to North from the district court's error was the same as if North had been forced to disclose his classified evidence to the IC under a statute that had *no* reciprocal disclosure requirement. App. 173a. Under this circumstance, "the [government] would . . . have had the benefit of nonreciprocal discovery rights," *Wardius*, 412 U.S. at 478, and that benefit—which the IC used to dismiss weak charges and otherwise plan its trial strategy, App. 172a—was severely prejudicial to North.

C. The Court of Appeals Erred in Placing the Burden of Proving Harm from Nonconstitutional Error on North

Because the court of appeals placed the burden of proof on the issue of harmless error on North, rather than on the IC, its decision also conflicts with *Kotteakos*. The burden of proof issue has produced a division in the courts of appeals that calls for resolution by this Court.

In *Kotteakos*, this Court construed the predecessor to 28 U.S.C. § 2111, the federal harmless error statute. Although the Court noted that the defendant had the burden of proving prejudice from merely *technical* errors, it made clear that the rule was different with

---

[23] *Wardius* makes this point clearly. There, the defendant withheld his alibi notice because state law did not provide reciprocal disclosure, and the trial court precluded him from presenting an alibi defense. Before this Court, the State argued that the defendant should have given the notice and permitted the trial court to construe state law to require reciprocity. *See* 412 U.S. at 476-77. The Court rejected that argument. It reasoned that if—as happened in North's case—the defendant had given his notice and the trial court had *not* ordered reciprocal disclosure, the defendant would have been irreparably harmed "since, once having given the State his alibi information, he could not have retracted it," and the prosecution "would still have had the benefit of nonreciprocal discovery rights . . . ." *Id.* at 478.

respect to errors that have a natural tendency to affect substantial rights: "But that this burden does not extend to all errors appears from the statement which follows immediately [in the legislative history]. 'The proposed legislation affects only technical errors. *If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding the legislation rest upon the one who claims under it.*'" 328 U.S. at 760 (emphasis added) (quoting H. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)); *see id.* at 765 ("[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.").

Drawing upon *Kotteakos*, the Tenth Circuit recently indicated that "[e]xcept possibly for minor, technical errors for which there is no reasonable possibility that the verdict could have been affected, the government ordinarily has the burden of proving that a non-constitutional error was harmless." *United States* v. *Rivera*, 900 F.2d 1462, 1469 n.4 (10th Cir. 1990) (en banc); *see also United States* v. *Grier*, 866 F.2d 908, 920 (7th Cir. 1989). ("Unlike the [*Chapman*] harmless error standard, the government is not required to demonstrate that [nonconstitutional] error was harmless beyond a reasonable doubt. Rather, the government must establish only that the error had no 'substantial influence on the verdict.'") (quoting *Kotteakos*, 328 U.S. at 765).[24] Similarly, in *United States* v. *Farnham*, 791 F.2d 331 (4th Cir. 1986), which involved a violation of the rule requiring sequestration of witnesses, the court placed

---

[24] By contrast, the Third Circuit has placed the burden of proving prejudice from at least some nonconstitutional error (a variance between the indictment and proof) on the appellant. *See United States* v. *Adams*, 759 F.2d 1099, 1110 (3d Cir.) (citing *Kotteakos*), *cert. denied*, 474 U.S. 906 (1985).

the burden of proving absence of prejudice on the government. The court found that

> any defendant in Farnham's position would find it almost impossible to sustain the burden of proving the negative inference that the [witness'] testimony would have been different had he been sequestered. A strict prejudice requirement of this sort would be not only unduly harsh but also self-defeating, in that it would swallow a rule carefully designed to aid the truth-seeking process and preserve the durability and acceptability of verdicts.

Id. at 335. Accordingly, the court reversed one of the defendant's three convictions and declined to reverse the other two only because it was satisfied that the violation of the rule "could not have affected the outcome" as to those counts and that "any presumption of prejudice [was] rebutted." *Id.* at 335-36.

The court of appeals in this case placed the burden of proving prejudice on North without acknowledging *Kotteakos* or the decisions of the courts of appeals requiring the government to show an absence of prejudice. App. 103a. This allocation of the burden was particularly unfair because of the difficulty in establishing specific prejudice from the compelled, nonreciprocal disclosure of North's CIPA notice. The district court's error clearly was "of such a character that its natural effect [was] to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 760 (quotation omitted). Indeed, *Wardius* characterized such a compelled, nonreciprocal disclosure as "fundamentally unfair." 412 U.S. at 476. Yet it is virtually impossible for North to quantify the extent to which he was harmed by surprise and the threat of surprise from evidence that the IC should have been required to disclose, or the extent to which the compelled disclosure of his 162-page CIPA notice benefitted the IC. It is precisely this situation—where error has occurred but prejudice, or the lack of prejudice, is difficult to determine—that the allocation of the burden of proof

is most critical.[25] By placing the burden on North, the panel majority effectively insulated the district court's error from appellate review. As the Fourth Circuit declared under analogous circumstances in *Farnham*, a "strict prejudice requirement" of the sort imposed by the panel majority "would swallow" CIPA § 6(f), which, like the rule at issue in *Farnham*, is "carefully designed to aid the truth-seeking process." 791 F.2d at 335.

CONCLUSION

If the Court grants the IC's petition for a writ of certiorari over North's opposition, then the cross-petition for a writ of certiorari should be granted as well.

Respectfully submitted,

BRENDAN V. SULLIVAN, JR.
Counsel of Record
BARRY S. SIMON
PAUL MOGIN
NICOLE K. SELIGMAN
JOHN D. CLINE
WILLIAMS & CONNOLLY
839-17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Cross-Petitioner

---

[25] Justice Stevens has suggested that harmless error analysis should not apply *at all* to nonconstitutional error "when the harmlessness of an error cannot be measured with precision." *United States* v. *Lane*, 474 U.S. 438, 474 (1986) (Stevens, J., dissenting); *see id.* at 462 (Brennan & Blackmun, JJ., concurring) (noting that Justice Stevens "may well be correct"); *cf. Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978) (harmless error analysis does not apply to constitutional error of joint representation because the analysis would involve "unguided speculation") (quotation omitted).

APPENDICES

TABLE OF CONTENTS

Page

Appendix A

United States v. *Poindexter,* Memorandum and Preliminary Order re CIPA (D.D.C. June 22, 1988) (698 F. Supp. 316) 1a

Appendix B

United States v. *North,* Memorandum and Order re Defendant's Third CIPA Notice (Testimony) (D.D.C. Dec. 23, 1988) (708 F. Supp. 399) 14a

Appendix C

U.S. Const. amend. V 21a

Appendix D

18 U.S.C. § 1505 ..... 22a

Appendix E

18 U.S.C. App. IV, Classified Information Procedures Act 23a

Appendix F

28 U.S.C. § 2111 ..... 33a

Appendix G

Fed. R. Crim. P. 52 ..... 34a

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Crim. No. 88-0080

UNITED STATES OF AMERICA

v.

JOHN M. POINDEXTER, OLIVER L. NORTH,
RICHARD V. SECORD, ALBERT HAKIM

June 22, 1988

MEMORANDUM AND PRELIMINARY ORDER RE CIPA

GESELL, District Judge.

The Court has before it the joint motion of the four defendants entitled Motion of Defendants for a Declaration that Section 5 of the Classified Information Procedures Act, and the Protective Order Entered April 15, 1988, Are Unconstitutional (Defendants' Joint Pretrial Motion No. 4). The motion has been fully briefed and argued.

Introduction

The Classified Information Procedures Act ("CIPA"), 18 U.S.C.App. IV, was designed to provide a mechanism in criminal cases that might involve disclosure of classified information by a defendant which would provide the Government sufficient information at an early stage to decide whether or not the possible harm to national se-

curity created by a defendant's need to disclose classified information outweighs the benefit to the public interest which is derived from prosecution of criminal charges. To this end, Congress established a series of primarily pretrial procedures to enable a trial judge to rule on the use, relevance or admissibility of the classified information requested by a defendant before any public disclosure during trial or pretrial proceedings.

Although prior decisions in other Circuits have upheld the constitutionality of CIPA,[1] this motion focuses on the constitutionality of the Act, particularly Section 5, as it applies to this unusual case. Here, serious issues arise because, unlike cases to date, the events covered by the indictment, much of the conduct of the participants—defendants and witnesses alike—and many of the intelligence methods and sources they employed are highly classified. In these circumstances a defendant seeking to use classified documents at the trial is required under a literal application of CIPA to reveal his defense before the trial starts and is confronted with other related obstacles and disadvantages. This is made apparent by a brief exposition of the provisions of the statute.

CIPA

Under CIPA, the classified information defendant reasonably expects to present or elicit from witnesses during trial proceedings in open court must go through a three-step process before it may be disclosed. First, the defendant is required to notify the Government and the court in writing of any classified information he reasonably expects to present or elicit from witnesses in pretrial or trial proceedings held in open court. Following

---

[1] *See United States v. Wilson*, 750 F.2d 7, 9-10 (2d Cir.1984), *cert. denied*, 479 U.S. 839, 107 S.Ct. 143, 93 L.Ed.2d 85 (1986); *United States v. Wilson*, 721 F.2d 967, 976 (4th Cir.1983); *United States v. Jolliff*, 548 F.Supp. 229, 231 (D.Md.1981). *See also United States v. Collins*, 720 F.2d 1195, 1200 (11th Cir.1983).

such notice, the Government may move for a hearing before the Court on the admissibility of the classified information at issue. Once the Court determines the use, relevance or admissibility of the classified information, it then must decide whether the information will be fully disclosed in open court or whether it is appropriate for the information to be presented in an alternative substituted or redacted form. The CIPA provisions detailing these three steps are discussed below.

Section 5(a) of CIPA provides in relevant part:

> If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing.

This section further specifies that the defendant's notice is to "include a brief description of the classified information" the defendant expects to present or elicit from witnesses. Until a specific item of classified information is properly noticed, defendants are prohibited from disclosing that information during trial or pretrial proceedings. In addition, Section 5(b) authorizes the Court to preclude the defendant from disclosing any classified material "not made the subject of notification" and to prohibit the defendant from "examin[ing] . . . any witness with respect to any such information."

Section 6 establishes proceedings for the determination by the court of the admissibility of classified information noticed by the defendant. It provides that the government may request a hearing on "all determinations concerning the use, relevance or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." CIPA § 6(a). The hear-

ing is to be held publicly unless the government certifies that classified information will be compromised and an *in camera* hearing is necessary. This section effects only the timing of determinations of use, relevance or admissibility by the court; the evidentiary standards for admissibility remain those currently applicable to all criminal cases.

Prior to the hearing, the government is required under Section 6(b) to identify for the defendant the classified information that will be at issue. Such notice to the defendant requires specific identification of the classified information at issue if the government has already made the information available to the defendant. Otherwise, the government may provide the defendant with a generic categorization of the information when approved by the court. Further, whenever the government requests a Section 6 hearing, upon request of the defendant the Court may order the government "to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing." *Id.* § 6(b)(2).

If the government's motion for a hearing has been timely filed prior to the pretrial or trial proceeding, the court must make its rulings on admissibility before the proceeding commences. *Id.* § 6(a). The Court is to set forth in writing the basis for its determinations as to each classified item reviewed. *Id.* If following an *in camera* hearing the Court deems classified information at issue to be inadmissible, the *in camera* record is to be sealed in the event of a post-trial appeal by the defendant. *Id.* § 6(d). The defendant, in addition, may seek reconsideration of the court's ruling at any time before or during trial. *Id.*

Whenever the court authorizes disclosure of specific classified information by the defendant at trial, the government may move for the court to order "the substitu-

tion for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove" or "the substitution for such classified information of a summary of the specific classified information." *Id.* § 6(c)(1)(A)-(B). The government's motion for alternative disclosure of admissible classified information will be granted by the court only if it finds that "the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." *Id.* In connection with the motion for alternative disclosure, the government may submit to the court an affidavit by the Attorney General certifying that disclosure of the information would damage national security and identifying the basis for the information's classification. *Id.* § 6(c)(2).

If the court denies a motion by the government for alternative disclosure of classified information, the government may file an affidavit by the Attorney General objecting to the disclosure of the information at issue. *Id.* § 6(e)(1). Upon receipt of such an affidavit, the court is to order the defendant not to "disclose or cause the disclosure of such information." *Id.* Section 6(e) then sets forth suggested, but not exclusive, remedial measures the court might impose to ensure the defendant's ability to fully present his defense. Whenever the defendant is prevented by Section 6(e)(1) from disclosing or eliciting from witnesses classified information, the court shall dismiss the indictment unless it determines that other remedial measures should be taken in the interests of justice. *Id.* § 6(e)(2). Such remedial measures may include orders dismissing specific counts of the indictment, finding against the government on any issue to which the excluded information relates, or striking or precluding all or part of a witness' testimony. *Id.* § 6(e)(2)(A)-(C). Remedial measures are not to take effect, however, until the government has had both an opportunity for interlocutory appeal, as provided by Section

7, and, thereafter, an opportunity to withdraw its objection to the disclosure of the classified information at issue. *Id.* § 6(e)(2).

Comment

This brief recital of the convoluted procedures contemplated under CIPA is sufficient alone to demonstrate that strict application of the statute to this proceeding would not only be difficult, but impossible to accomplish consistent with a fair and expeditious resolution of this case. A few facts already established in the existing pretrial record make this conclusion immediately apparent. Some of the witnesses and defendants, particularly defendant North, operated from secure locations in the White House with full access to the most sensitive information and most critical national security intelligence methods and sources available to the government. This information, and even some methods and sources, are inextricably enmeshed in the events challenged by the indictment. Approximately 50,000 pages of "core" documents so designated by the prosecution as being of possible relevance and materiality are being made available to defendants *in camera*, and the bulk still remain classified in whole or in part.[2] Other documents presenting classification problems are still forthcoming under the Court's broad discovery Order. Two defendants, Poindexter and North, sought generalized unlimited further disclosures which would have involved the search of millions of extremely sensitive documents over an extended period of many, many months.[3] Some of the agency witnesses to be called at trial hold high positions in the government, deal daily with classified information, and were involved in cooperative intelligence arrangements between this country and its allies, arrangements

---

[2] The prosecution has even been unwilling to disclose, *in camera*, certain materials to all of the defendants during informal discovery.

[3] This motion was denied and reconsideration is also denied.

which were activated to aid authorized initiatives mentioned in the indictment. Throughout the documents, individuals still in covert status are mentioned and a few may be witnesses. Moreover, as far as the record discloses, there was no advance consideration by the Attorney General as to how his request for an Independent Counsel grand jury investigation of Oliver North and others might affect national security if indictments were eventually returned. Accordingly, much of the testimony and exhibits used in the grand jury proceedings was originally classified and portions remain in this status.

It will be impossible to conduct this case under the precise strictures of CIPA, not only because of this broad intrusion into classified areas of information but also because it is impossible in advance to determine and correctly rule on all issues of relevance, materiality and admissibility. It probably was never contemplated that classified information problems of this magnitude would be presented to a trial judge in a single case. Nor was CIPA primarily designed for a case where a defendant was the author or recipient of much of the classified data and had not himself been charged with making unauthorized disclosures of the information.

Fortunately, Congress was alert to the fact that special cases might create special problems. It made clear that in any case involving classified information the defendant should not stand in a worse position because of such information than he would have if there were no such statutory procedures. 1980 U.S.Code Cong. & Admin. News 4294, 4302. To this end, Congress commented that it expected the trial judge "to fashion creative and fair solutions" for classified information problems. *Id.* at 4301. At the same time, it emphasized that the Court should not undertake to balance the national security interests of the government against the rights of the defendant but rather that in the end remedies and sanctions against the government must be designed to make the

defendant whole again. *Id.* at 4303. Thus while a limited opportunity for creative judicial adjustment of CIPA procedures exists, in the end, defendant's constitutional rights must control.

While afforded this leeway, the Court is unable to determine definitely at this stage whether or not the classified document problems presented by this case can be resolved. It proposes to make the effort but the complexity of the situation defies obvious answers. Final ruling on the motion must await further developments.

It will aid discussion to focus on defendant North, the first defendant who will be tried. At this point, after several weeks of vigorous pretrial activity, Independent Counsel has already submitted the documents he intends to offer when presenting his case-in-chief. This submission is somewhat incomplete and defendant North's objections have not been heard. These materials are contained in six boxes of unclassified and now fully declassified documents and four boxes of documents with proposed redactions or substitutions for portions of classified information. The classified information has been disclosed to defendant North under seal, together with the proposed substitutes designed to safeguard aspects of special national security concern. Accordingly, the nature of the confidential material in these documents is fully known to defendant North because the full text has been supplied and apparently will continue to be supplied to him and his counsel, *in camera.* Discovery is scheduled to end July 1, 1988.

Thus, the case is now in a posture where defendant North [4] must soon invoke section 5 under CIPA and notice Independent Counsel of any classified portions of the papers in the discovery materials or particular, clearly

---

[4] Notices from other defendants not now scheduled for trial can be deferred.

identified documents otherwise known to him which he believes are required for his defense. North must also separately comment on reductions and substitutions in the government's case-in-chief at a date to be set. Counsel for North, by reason of his client's past employment and prior proceedings in the Iran-contra matter, is well aware of classified procedures and the events in issue and thus is unusually qualified to provide a precise, highly particularized notice.

The Court must recognize that there remain procedural aspects of particular concern to each of the defendants and particularly defendant North. Counsel for North has urged that strict application of CIPA will force North to reveal to the government well in advance his strategy, his evidence, and, indeed, even aspects of his defense. He suggests this will include the following: the testimony of defense witnesses; the reasons for requesting classified documents he plans to introduce at trial; the classified information he expects to elicit from prosecution government witnesses by cross-examination; and the contents of defense counsel's questions, to the extent they may reasonably be expected to elicit classified information. Counsel urges that North's own proposed testimony must be disclosed well before he has even decided whether or not to take the stand, and that the opening and closing statements of counsel must be reviewed in advance. This, it is argued with considerable force, will place North at a practical and tactical disadvantage, infringing upon his constitutional rights under the Fifth and Sixth Amendments. These considerations lie at the heart of defendants' constitutional challenge. The Court has determined that many of these concerns can hopefully be avoided by applying pretrial procedures consistent with the congressional intent underlying CIPA. A way must be found to preserve defendant's constitutional rights that still affords adequate protection for national security concerns.

Accordingly, the Court:

(1) Directs defendant North to file his Section 5 notice by July 11, 1988. The notice may be later supplemented as to documents not received by that date in legible form or by delay in fulfilling the Court's discovery Order. The notice shall satisfy the standard for specificity of notice set out in *United States v. Collins*, 720 F.2d 1195, 1199 (11th Cir.1983), and shall cover the documents or other information possessed by North that contains classified information he reasonably expects to disclose in any manner during trial. The notice may be accompanied by a precise demand for other classified materials revealed by the formal and informal discovery and a particularized and clearly identifiable demand for separate documents known to defendant that he requires for his defense. The undifferentiated discovery already rejected by the Court shall not be reinstituted in the guise of such a demand.

(2) The Court will hear counsel for defendant North at what may prove to be more than a single *in camera, ex parte* oral presentation commencing on July 14, 1988, at 9:30 a.m., for the sole purpose of being informed, without disclosure to Independent Counsel, of the reasons why he and his counsel consider the specific items of classified information he is seeking under (1), above, to be required as relevant and material to his defense.[5] During this hearing process the Court may explore alter-

---

[5] The hearings, in any event, will be held *in camera* because the Court has determined in its discretion that closure is essential to protect classified materials that are not relevant and material to the issues, that because of the highly sensitive nature of some of these materials the governmental interest in their protection is compelling and that there is no reasonable lawful alternative available for the fair and impartial administration of justice consistent with the Constitution in this limited instance. *See Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982).

native means of providing the classified data desired by North in nonclassified form, or in an alternative overall narrative presenting defendant's factual version of his defense or a substantial segment of same in the form of stipulations.

(3) Thereafter, the Court will rule as to the relevance and materiality of items so noticed as promptly as possible, but without revealing defense strategy. Its decisions will be sent directly to the interagency declassification group. When appropriate, a ruling on an item may have to be deferred pending developments at trial. The Court reserves the right to consult the interagency declassification group informally about the content of a particular document. Independent Counsel shall not be informed of any such consultation.

(4) After the Court rules on the classified materials so noticed, the interagency declassification group will then review whether any further classified information can be released as the rulings may require and so advise the Court and Independent Counsel. Independent Counsel will then be provided the opportunity to seek redaction or substitution under Section 6(c) of CIPA. Thereafter, the Court will consider what further steps are necessary in the light of what has developed.

In outlining the various steps still necessary before trial, the volume of documents requires that processing at the Section 5 stage and the subsequent reference of rulings to the interagency declassification group must proceed intermittently as documents are noticed while other documents remain to be identified for notice or await ruling. The Court will expect completion of the process to the Section 6(c) stage before August 1, 1988.

(5) The Court will at no time review in advance defense counsel's opening statement, proposed defense questions or the subject matter to be covered by defense witnesses. It contemplates only that counsel for North will proceed at all times within the scope allowed by the

Court's rulings on the notices, that counsel will so advise defense witnesses, and that the Court will be advised sufficiently in advance if unexpected developments during trial indicate to defense counsel a pressing need to proceed beyond these strictures so that further court ruling can be obtained.

(6) There will be no review of defendant North's testimony in advance. When and if he is about to testify, his counsel will advise the Court if it then appears the testimony will involve classified national security disclosures beyond those then authorized under prior rulings of the Court and, again, a specific further ruling will be obtained.

This procedure preserves the essential protections of CIPA but in a manner that does not impair defendant's rights. There is no reason to believe that Mr. Sullivan, defendant North's highly professional, experienced counsel will knowingly abuse the Court's willingness to allow the case to proceed without the excessive judicial supervision that CIPA might require under different circumstances.

(7) There is no present need to alter the Court's Protective Order.

One final matter touching on CIPA is presented by a separate series of briefs directed to the nature of Independent Counsel's CIPA authority. He is, in the Court's view, responsible for the investigation and prosecution of this case under each of his dual appointments. He has advised the Court that he will proceed with deference to the Executive's national security concerns as expressed to him through the interagency declassification group with which he has closely collaborated.

This question of where ultimate authority rests under CIPA as between the Attorney General and Independent Counsel under various circumstance that may arise from this point on under Section 6(c) or otherwise is not ripe for decision. Common sense suggests the Attorney Gen-

eral should immediately appoint a statutory designee under CIPA for all purposes so that his designee can be informed of any serious national security concerns, if and when they arise, both by the Justice Department's representative on the interagency declassification group and by Independent Counsel. This would assure a prompt, informed mutual decision by the Attorney General and Independent Counsel should any major issue concerning disclosure of classified material arise at any future stage of this case and minimize delay.

Conclusion

The defendants' joint motion to declare the provisions of CIPA, particularly as applied to this case, and the Court's Protective Order unconstitutional is denied, without prejudice to await further developments, and the Court declines to rule on the status of Independent Counsel under that Act at this time for lack of ripeness, awaiting the Attorney General's possible appointment of a designee under that statute.

SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Crim. No. 88-0080-02

UNITED STATES OF AMERICA

v.

OLIVER L. NORTH

Dec. 23, 1988

MEMORANDUM AND ORDER RE DEFENDANT'S THIRD CIPA NOTICE (TESTIMONY)

GESELL, District Judge.

The Classified Information Procedures Act, 18 U.S.C. App. ("CIPA") applies to classified testimony as well as to classified documents. Classified information is defined in Section 1 of that Act as including "information and material" subject to classification or otherwise requiring protection from public disclosure. Information, of course, includes knowledge derived from one's work experience and hence, proposed testimony falls under the restrictions of CIPA.

Pursuant to the Court's pretrial responsibilities under CIPA, it directed North on November 23, 1988 to file a written statement of relevant and material testimony he expects to disclose or cause to be disclosed in his defense.[1] North responded, over objection, attaching a Warning

---

[1] This and prior Orders have also led to processing of the classified material in North's documentary case.

Notice [2] to a narrative statement of classified information he desires to use or present at trial. This document consists of 162 typewritten pages and, as directed by the Court, was filed *ex parte* under seal.

The Court now confronts a need to disclose this narrative to Independent Counsel for pretrial processing as required by Sections 5 and 6 of CIPA—a course of action which North vigorously resists on the ground that this requirement is unconstitutional and violates his rights under the Fifth and Sixth Amendments.

The Court has closely examined the narrative statement in the light of its knowledge of the issues and proof gained over approximately ten months of intense pretrial activity. The nature of the notice is indicated below:

(1) A substantial portion of the narrative statement contains revelant and material facts and information of value to the defendant, which may be presented eventually in testimony or which may be used during cross-examination of government witnesses.

(2) Some of the facts noted in the narrative statement are known to Independent Counsel and some are immaterial. However, the statement contains references to many pertinent facts and circumstances which the Court believes are likely to alert Independent Counsel to aspects of issues not previously brought to his attention.

(3) The narrative statement, while somewhat evidentiary in character, does not indicate which individuals mentioned will be witnesses, nor does it develop in any detail how most the facts mentioned will be proven.

(4) The narrative statement does not tie the information to any particular count in which North is charged or undertake to support statements by documentation found in North's own case or in papers disclosed to him by the government during the elaborate documentary discovery.

---

[2] Appendix A to this Memorandum.

(5) The narrative statement is by its very nature only partially revealing because it makes no reference, of course, to related nonclassified proof which could place the classified information noticed into clearer perspective or significance.

(6) The narrative statement does not commit North to call any witness and does not identify any witnesses.

(7) In no way does the narrative represent, directly or indirectly, that North himself will or will not testify; when he may testify, if he does; or what he would testify about if he were to testify.

Given these circumstances, the Court has determined that immediate processing of the narrative statement under CIPA is appropriate for several major reasons.

A. CIPA mandates pre-trial disclosure. Under the Act it is necessary to inform the government of the extent to which sensitive classified information is likely to be revealed during trial (whether through testimony, cross-examination or opening statement) so that both Independent Counsel and the Attorney General can perform their separate responsibilities under Section 6 of CIPA. *See, Memorandum and Preliminary Opinion Re CIPA*, filed June 22, 1988 at 15, 16.

B. CIPA's required pre-trial disclosure to Independent Counsel cannot be modified because this is not a case where limited classified information is only an incidental part of the case and disclosure could perhaps be deferred. Rather, in this instance classified information surrounds and immerses the entire case for both sides.

C. Trial is set to commence January 31, 1989.

North's constitutional claims lack merit. No further hearing is necessary. North has previously briefed the issues and there has been full argument in connection with his motion to declare CIPA unconstitutional on its face and as applied.

As to the Fifth Amendment due process claim, modern pretrial practice in complex criminal cases contemplates extensive pretrial disclosures by the parties in the interests of ascertaining the truth. Recent decisions of the Supreme Court as well as the Federal Rules of Criminal Procedure make this abundantly clear. *See, e.g., United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975); *Wardius v. Oregon*, 412 U.S. 470, 473, 93 S.Ct. 2208, 2211, 37 L.Ed.2d 82 (1973); Fed.R.Crim.P. 12.1, 12.2, 16, 32(c)(3)(A), (C). North has had access to approximately 900,000 pages of government documents; the classified documents the government will use against him have been identified, as have the witnesses; and North will receive all Jencks material, including grand jury testimony, two weeks before trial. The prosecution has recently filed several memoranda narrowing the issues in the case and explicating some aspects of its theory of the case. In addition, over several days of CIPA § 6 hearings, at which defense counsel were present, the Independent Counsel explained the significance to its theory of the case of many of the classified documents in its case-in-chief, and Independent Counsel responded frankly to the Court's numerous inquiries about its case. The Court cannot accede to North's view of due process that one is entitled to get everything and to disclose nothing. Due process is an even-handed concept and this claim is rejected.

As to North's Sixth Amendment claim, disclosure involves no significant interference or substantial prejudice to North's right to the effective assistance of counsel. His attorneys are still free to call or not to call any witness and equally free to determine what questions to ask or not to ask. The tactical disadvantage that may accrue by minimizing surprise is slight. Government witnesses cannot readily adjust or coordinate their testimony to meet the defense, as North suggests, because they are committed under oath and otherwise to their positions. Moreover, the federal courts have long recognized that a degree of defense disclosure is necessary to prevent introduction

of vital or unexpected proof, which has a tendency to force adjournment delay to permit investigation or to resolve new legal problems presented. *Williams v. Florida*, 399 U.S. 78, 80-86, 90 S.Ct. 1893, 1895-1898, 26 L.Ed.2d 446 (1970). It is the Court's obligation to assure issues are delineated before trial commences. *See*, Fed.R.Crim.P. 17.1. The fact that the alleged violations in this instance occurred behind the screen of classification over a period of time should not place this defendant in any different position; indeed, it enhances the need for pre-trial disclosure by the defense.

North has by his Warning Notice apparently anticipated this ruling and has indicated he desires to seek relief by some kind of application to the Court of Appeals. The Court has given no consideration to the merits, or lack of merit, of such an application. It will, however, delay transmitting the narrative statement to Independent Counsel.

Accordingly, defendant North and his counsel are hereby notified that the narrative statement will be transmitted to Independent Counsel under seal by 4:00 p.m. on January 3, 1989 for processing by Independent Counsel and consideration by the Attorney General, where appropriate under CIPA. Independent Counsel shall submit proposed redactions and substitutions *in camera* on or before January 11, 1989.

SO ORDERED.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 88-0080—02-GAG

UNITED STATES OF AMERICA

v.

OLIVER L. NORTH,

Defendant.

(EX PARTE, UNDER SEAL)
(CONTAINS CLASSIFIED INFORMATION)

WARNING NOTICE

THIS PLEADING CONTAINS DEFENSE WORK PRODUCT PROVIDED TO THE COURT ONLY OVER DEFENSE OBJECTIONS.

DEFENDANT OBJECTS TO ANY REPRODUCTION OR DISCLOSURE OF THE CONTENTS OF THIS WORK PRODUCT. DISCLOSURE WILL VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS.

DISCLOSURE OF CRIMINAL DEFENSE WORK PRODUCT ON THIS SCALE EVEN TO THE COURT IS UNPRECEDENTED.

DEFENDANT REQUESTS NOTICE AND AN ADEQUATE OPPORTUNITY TO BE HEARD (BOTH IN THIS COURT AND BY MANDAMUS

OR APPEAL) PRIOR TO ANY DISCLOSURE OF THE CONTENTS OF THIS FILING.

DEFENSE WORK PRODUCT PROVIDED OVER OBJECTION. REPRODUCTION OR DISCLOSURE WILL VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS.

APPENDIX C

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

TITLE 18, UNITED STATES CODE

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

APPENDIX E

TITLE 18, UNITED STATES CODE, APPENDIX IV CLASSIFIED INFORMATION PROCEDURES ACT

§ 1. Definitions

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954.

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

§ 2. Pretrial conference

At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any matters which relate to classified information or which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

§ 3. Protective orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified

information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

§ 4. Discovery of classified information by defendants

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

§ 5. Notice of defendant's intention to disclose classified information

(a) Notice by defendant.—If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified

information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) Failure to comply.—If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

§ 6. Procedure for cases involving classified information

(a) Motion for hearing.—Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice.—(1) Before any hearing is conducted pursuant to a request by the United States under subsection

(a), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such form as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a) of this section, the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative procedure for disclosure of classified information.—(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of records of in camera hearings.—If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(e) Prohibition on disclosure of classified information by defendant, relief for defendant when United States opposes disclosure.—(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) of this section and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

(f) Reciprocity.—Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

§ 7. Interlocutory appeal

(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of

appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

§ 8. **Introduction of classified information**

(a) Classification status.—Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) Precautions by court.—The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.

(c) Taking of testimony.—During the examination of a witness in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safe-

guard against the compromise of any classified information. Such action may include requiring the United States to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

§ 9. Security procedures

(a) Within one hundred and twenty days of October 15, 1980, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

(b) Until such time as rules under subsection (a) of this section first become effective, the Federal courts shall in each case involving classified information adopt procedures to protect against the unauthorized disclosure of such information.

§ 10. Identification of information related to national defense

In any prosecution in which the United States must establish that material relates to the national defense or constitutes classified information, the United States shall notify the defendant, within the time before trial specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense.

§ 11. Amendments to Act

Sections 1 through 10 of this Act may be amended as provided in section 2076, Title 28.

§ 12. Attorney General guidelines

(a) Within one hundred and eighty days of October 15, 1980, the Attorney General shall issue guidelines specifying the factors to be used by the Department of Justice in rendering a decision whether to prosecute a violation of Federal law in which, in the judgment of the Attorney General, there is a possibility that classified information will be revealed. Such guidelines shall be transmitted to the appropriate committees of Congress.

(b) When the Department of Justice decides not to prosecute a violation of Federal law pursuant to subsection (a)of this section, an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute. The findings shall include—

(1) the intelligence information which the Department of Justice officials believe might be disclosed,

(2) the purpose for which the information might be disclosed,

(3) the probability that the information would be disclosed, and

(4) the possible consequences such disclosure would have on the national security.

§ 13. Reports to Congress

(a) Consistent with applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the Attorney General shall report orally or in writing semiannually to the Permanent Select Committee on Intelligence of the United States House of Representatives, the Select Committee on Intelligence of the United States Senate, and the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and House of

Representatives on all cases where a decision not to prosecute a violation of Federal law pursuant to section 12(a) has been made.

(b) The Attorney General shall deliver to the appropriate committees of Congress a report concerning the operation and effectiveness of this Act and including suggested amendments to this Act. For the first three years this Act is in effect, there shall be a report each year. After three years, such reports shall be delivered as necessary.

§ 14. Functions of Attorney General exercised by Deputy Attorney General, the Associate Attorney General, or designated Assistant Attorney General

The functions and duties of the Attorney General under this Act may be exercised by the Deputy Attorney General, the Associate Attorney General, or by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official.

§ 15. Effective date

The provisions of this Act shall become effective upon October 15, 1980, but shall not apply to any prosecution in which an indictment or information was filed before such date.

§ 16. Short title

That this Act may be cited as the "Classified Information Procedures Act".

APPENDIX F

TITLE 28, UNITED STATES CODE

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

APPENDIX G

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.